

Lots Of Little Things — Recent FAR Updates

Law360, New York (August 19, 2013, 12:57 PM ET) -- Every now and then, the Federal Acquisition Regulation Councils issue a Federal Acquisition Circular (FAC) — an update to the Federal Acquisition Regulation implementing a number of changes. Often, these changes are rather pro forma. But occasionally, you get a circular with many different (and interesting) issues.

FAC 2005-67, issued in late June 2013, with rules that became effective in June and July 2013, is one such circular. We thought it would be helpful to highlight five of these rules that raise interesting and timely issues, especially where they may signal additional changes yet to come.

Open-Ended Government Indemnification in EULAs — Comments Welcome

A new interim rule addresses the government's ability to agree to a company's standard commercial end-user license agreement (EULA), which is an extremely common part of using software or social media. See 78 Fed. Reg. 37686. Since some of the terms and conditions contained in an EULA may conflict with federal law, the specific provisions may not be enforceable against the government.

Obviously, this can be a shock for the new or unknowing government contractor who thought that it understood the terms governing its agreement with the end user. This issue is not completely new, but the new FAC and the new FAR updates move the ball forward. The effective date of the interim rule is June 21, 2013. Comments on the interim rule should be submitted on or before Aug. 20, 2013.

Previously in 2012, a written opinion from the U.S. Department of Justice Office of Legal Counsel (see "Memorandum for Barbara S. Fredericks, Assistant General Counsel for Administration," United States Department of Commerce, March 27, 2012) opined that open-ended promises by an authorized government official to indemnify a company based on the use and/or misuse of a software product, which would occur were the government to agree to most standard EULAs, violate the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1517, which limits government employees from making promises to pay on open-ended obligations without having the necessary appropriations already in place.

More recently, the Office of Management and Budget (OMB) issued guidance regarding standard promises by the government to indemnify when using social media applications. See "Memorandum for the Heads of Executive Departments and Agencies," M-13-10 (April 4, 2013). Specifically, the OMB recommended that the FAR be amended:

to require contracting officers to put contractors on notice that any TOS [Terms of Service], EULA, or other agreement requiring the government or government-authorized end user to indemnify the contractor for damages, costs, or fees incurred is unenforceable against the government or end-user and will be read out of the agreement to prevent violations of the Antideficiency Act.

Responding in large part to these comments from the DOJ and the OMB, the FAR Councils recently issued the new interim rule to promote consistency throughout government agencies with regard to treatment of open-ended indemnification clauses, which should reduce time and cost-spent negotiating terms governing social media applications provided to various agencies. The FAR Councils estimate that the interim rule will affect 75 percent of the U.S. General Services Administration's IT Schedule 70 vendors.

New FAR sections added by the interim rule include the following:

- FAR 12.216, Unenforceability of unauthorized obligations: This provision outlines the issue presented above where supplies or services acquired by the government are subject to an open-ended indemnification clause, pointing to new subparagraph (u) at 52.212-4, Contract Terms and Conditions – Commercial Items, which specifies that such a clause is unenforceable against the government, the government will not be deemed to have agreed to such a clause even where it clicks “I agree” and such a clause will be read out of the agreement. The foregoing does not apply to government indemnification that is expressly authorized by statute and agency regulations. Commercial vendors should be aware of this change because FAR 52.212-4 contains the standard terms and conditions related to commercial items and is to be included the majority of commercial item contracts.
- FAR 13.202, Unenforceability of unauthorized obligations in micropurchases: This provision is similar to that at FAR 12.216. It provides that a new clause, FAR 52.232-39 (discussed below) automatically applies to any micropurchase (beneath \$3,000). This is a big deal because right now, micropurchases are subject to almost zero FAR clauses. But the new clause dealing with restrictions on open-ended indemnification likely will apply, whether incorporated in a purchase agreement or not.
- FAR 32.705, Unenforceability of unauthorized obligations: This provision relating to contract funding contains language similar to that in FAR 12.216 and FAR 13.202 and reminds contracting officers of limitations on their ability to agree to specific terms.
- FAR 52.232-39, Unenforceability of unauthorized obligations: This provision is to be inserted in all solicitations and contracts. As in FAR 52.212-4(u), this provision provides that an indemnification clause in an EULA or TOS that would create an Anti-Deficiency Act violation is unenforceable against the government, is deemed not agreed to even where the government clicks “I agree” and will be read out of the agreement. The foregoing does not apply where government indemnification is expressly authorized by statute and applicable agency regulations.

The interim rule acknowledges that its purpose is to address the concerns raised in the DOJ opinion and recognizes that “there are also other clauses in commercial [EULAs] and TOS that could result in a violation of the Anti-Deficiency Act.” The GSA has previously circulated a list of these types of clauses on a “fail list,” which objects to items such as choice of law provisions, automatic renewals, requirements to pay fees and penalties, provisions allowing users who are not contracting officers to bind the government, etc.

So, look for future amendments that expand on the issue addressed in the interim rule and potentially address more of the issues previously raised in the GSA “fail list.”

Updates Regarding the System for Award Management

The FAR Councils also issued a final rule, effective July 22, 2013, that updates the FAR to reference the System for Award Management (SAM) database. See 78 Fed. Reg. 37676; see also 78 Fed. Reg. 28756 (updating references in the Defense Federal Acquisition Regulation Supplement). If you do not know what the SAM is, you should.

Basically, SAM is a new, one-stop database for all contractor information. SAM is designed to be the primary government repository for contractor information and the centralized government system for contracts, grants and other assistance-related processes required for doing business with the government.

Information in SAM includes data from prospective awardees required to do business with the government (such as contractor Data Universal Numbering System number and Commercial And Government Entity code), annual representations and certifications submitted by contractors, identification of contractors excluded from receiving contracts and subcontracts and listings of information regarding financial and non-financial assistance and benefits.

SAM replaces the now-retired Central Contractor Registration (CCR), Online Representations and Certification Application (ORCA) and Excluded Parties List System (EPLS) databases. Consolidating these databases was part of “Phase 1” of the GSA’s efforts related to SAM (which began in July 2012). (Plans for later “phases” involve joining additional government procurement systems, including FedBizOps and the Past Performance Information Retrieval System; but the GSA needs to get the funding first.)

Use of SAM is intended to enhance the efficiency of government contracting by eliminating the need for data entry at multiple sites and allowing easier access to vendor, contract award and reporting information by maintaining it in one place. The FAR and the DFARS have now been updated to include references to SAM, rather than to the now-obsolete CCR, ORCA and EPLS.

Acquisitions By Civilian Agencies on Behalf of DOD Customers

A new final rule (FAR Case 2012-010), effective July 22, 2013, reminds us of special restrictions that may apply when a civilian agency makes purchases on behalf of U.S. Department of Defense customers. See 78 Fed. Reg. 37684. Per the rule (which was previously implemented via an interim rule), a civilian agency conducting a procurement on behalf of the DOD must certify compliance with defense procurement requirements for the fiscal year in which it will conduct the acquisition.

“Defense procurement requirements” include the FAR and other laws and regulations applicable to federal procurements of property and services and laws and regulations applicable to procurements by the DOD, including DOD financial management regulations, the DFARS and the DFARS procedures, guidance and information. Agency certifications are to be sent to the DOD within 30 days of the beginning of each fiscal year.

This new rule serves as a good reminder that a company's compliance protocols that are in place for civilian contracts may not necessarily satisfy additional requirements where the DOD is the ultimate customer — particularly where the DFARS imposes a host of additional terms and conditions that may apply (including, perhaps, additional reporting requirements, additional country of origin requirements, etc.).

Contractors should ensure that they understand the requirements applicable to any interagency acquisition in which they may be involved and that they are in full compliance with the final terms and conditions of any purchase order (as supplemented by the DOD-unique terms and conditions).

Clarifying the Role of the Contracting Officer's Representative

Another new final rule (FAR Case 2013-004) clarifies the role and responsibilities of a Contracting Officer's Representative (COR). See 78 Fed. Reg. 37675. The final rule reiterates that a COR "[h]as no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions." FAR 1.602-2(d)(5).

It further reiterates that a contractor is to be given a written description regarding the COR and the COR's authority, including limitations on that authority and a statement that the COR may be personally liable for unauthorized acts.

This amendment is not really anything new, but it serves as a clear reminder to contractors that while the COR plays an important role in managing and administering the program, the COR does not have authority to change the contract. Companies follow COR directions to work beyond the scope of the contract at their own peril (and the COR himself/herself may face individual consequences for engaging in conduct that exceeds the bounds of his/her authority).

Removing Limitations for Women-Owned Small Business Set-Asides — Comments Welcome

Another interim rule, effective June 21, 2013, removes the statutory limitation on the dollar amount for set-asides to economically disadvantaged women-owned small business (EDWOSB) concerns and/or women-owned small business (WOSB) concerns eligible under the WOSB program. See 78 Fed. Reg. 37692. The prior dollar limits were \$6.5 million for manufacturing and \$4 million for all other contracts.

Now, acquisitions at any dollar level above the micropurchase threshold may be set aside to EDWOSB concerns or WOSB concerns eligible under the WOSB program, provided the other requirements for set-asides under the WOSB program are met. This change was made to implement Section 1697 of the fiscal year 2013 National Defense Authorization Act, which removed the monetary cap. Comments on the interim rule are due by Aug. 20, 2013.

The interim rule recognizes that the amendment "may have significant positive economic impact" on the above-mentioned small business concerns and also that it "may have a negative effect" on small businesses not owned by women and WOSBs that are not included in the WOSB program, where these concerns may be excluded from competitions that previously could not be set aside due to dollar limitations. The rule seems like a good idea to us, so long as agencies ensure that award is made to the WOSB that will do the best job.

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